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No. 06-1689

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IN THE

Supreme Court of the United States

ROSA ACUNA, Administratrix ad Prosequendum of the Estate of ANDRES ACUNA, deceased,

Petitioner,

v.

SHELDON C. TURKISH, M.D., and OBSTETRICAL and GYNECOLOGICAL GROUP OF PERTH AMBOY-EDISON,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Whether the Superior Court of New Jersey, Appellate Division, correctly affirmed the dismissal of Petitioner's claim that the New Jersey Wrongful Death Statute, *N.J. Stat. Ann.* § 2A:31-1 to -6 (2008), violates the Fourteenth Amendment's Equal Protection Clause because it does not include a cause of action for the wrongful death of a non-viable fetus.

PARTIES TO THE PROCEEDING

Petitioner, Rosa Acuna, is an individual and a resident of the State of New Jersey.

Respondent Sheldon C. Turkish is a individual licensed to practice medicine in the State of New Jersey. Respondent Obstetrical and Gynecological Group of Perth Amboy-Edison, P.C. is a professional corporation of the State of New Jersey.

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6

Respondent Obstetrical and Gynecological Group of Perth Amboy-Edison does not have a parent corporation and there is no publicly held company that owns 10% or more of its stock.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

CORPORATE DISCLOSURE STATEMENT PURSUANT TO SUPREME COURT RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF CITED AUTHORITIES v

COUNTERSTATEMENT OF THE CASE 1

REASONS FOR DENYING THE PETITION 4

POINT I: .....

The Appellate Division Correctly Held, In Accord With Other State and Federal Courts, that the "Born Alive" Requirement of New Jersey's Wrongful Death Act Does Not Violate Fourteenth Amendment Equal Protection Guarantees. 7

POINT II: .....

The Appellate Division's Holding Is Consistent with Other State Courts of Last Resort to Consider the Question. 18

CONCLUSION 24

Contents

Page

APPENDIX A — STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS 1

TABLE OF CITED AUTHORITIES

Page

FEDERAL CASES

Alexander v. Whitman, 114 F.3d 1392 (3d Cir. 1997), *cert. denied*, 522 U.S. 949 (1997) ..... *passim*

BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) 9-10

Fields v. Legacy Health Sys., 413 F.3d 943 (9th Cir. 2005) 12, 13

Geier v. American Honda Motor Co., Inc., 529 U.S. 861 (2000) 9

Gonzales v. Raich, 545 U.S. 1 (2005) 9

Marie v. McGreevey, 314 F.3d 136 (3d Cir. 2002), *cert. denied*, 539 U.S. 910 (2003) ..... *passim*

Miles v. Apex Marine Corp., 498 U.S. 19 (1990) ... 8

Parham v. Hughes, 441 U.S. 347 (1979) 13

Planned Parenthood v. Casey, 505 U.S. 833 (1992) 6, 11, 14

Roe v. Wade, 410 U.S. 133 (1973) 6, 11, 14, 19

Sea-Land Services, Inc. v. Gaudet, 414 U.S. 573 (1974) 8, 9

Page

Silkwood v. Kerr-McGee Corp., 464 U.S. 238 (1984) 9

Washington v. Glucksberg, 521 U.S. 702 (1997) ... 12

STATE CASES

Acuna v. Turkish, 808 A.2d 149 (N.J. Super. Ct. App. Div. 2002), *on subsequent appeal following remand*, 894 A.2d 1208 (N.J. Super. Ct. App. Div. 2006), *certification granted on subsequent appeal*, 902 A.2d 1234 (N.J. 2006), *appeal dismissed as to the issues raised by this petition*, 915 A.2d 1045 (N.J. 2007) ..... *passim*

Canino v. New York News, Inc., 475 A.2d 528 (N.J. 1984) 3

Fort Worth Osteopathic Hosp. v. Reese, 148 S.W.3d 94 (Tex. 2004) 6, 20, 22

Giardina v. Bennett, 545 A.2d 139 (N.J. 1988) ... *passim*

Graf v. Taggart, 204 A.2d 140 (N.J. 1964) 5

Hernandez v. Garwood, 390 So. 2d 357 (Fla. 1980) 6, 19, 20

Jeter v. Mayo Clinic Arizona, 121 P.3d 1256 (Ariz. App. 2005) 15

Cited Authorities

Page

Justus v. Atchison, 565 P.2d 122 (Cal. 1977), *overruled on other grounds, Ochoa v. Superior Court*, 703 P.2d 1 (Cal. 1985) 6, 19

Kandel v. White, 663 A.2d 1264 (Md. 1995) 6, 20

McVey v. Sargent, 855 N.E.2d 324 (Ind. Ct. App. 2006), *transfer denied*, 869 N.E.2d 447 (Ind. 2007) 6, 22

Smith v. Whittaker, 734 A.2d 243 (N.J. 1998) 3

Wallace v. Wallace, 421 A.2d 134 (N.H. 1980) 23

Young v. St. Vincent's Medical Center, 653 So.2d 499 (Fla. Dist. Ct. App. 1995), *aff'd*, 673 So.2d 482 (Fla. 1996) 20

STATE STATUTES

N.J. Stat. Ann. § 2A:15-3 3

N.J. Stat. Ann. § 2A:31-1 8

N.J. Stat. Ann. § 2A:31-1 to -6 i

Tex. Civ. Prac. & Rem. Code Ann. § 71.001 (Vernon 2007) 20

COUNTERSTATEMENT OF THE CASE

Petitioner, Rosa Acuna ("Petitioner" or "Acuna") is a woman who grew up in the New Jersey and New York City area and who, at the time of her deposition, had two children. She attended high school for four years, but did not graduate. (Pa555-56, 575, 634.)

On December 31, 1991, Acuna became a patient of Respondent Dr. Turkish's medical practice. (Pa579.) At that time, she was using oral contraceptives to avoid pregnancy. (Pa558-Pa559.)

On January 7, 1993, Acuna was seen by Dr. Armine Vafai, the other physician in the practice, because of bleeding in connection with a pregnancy. (Pa564-Pa565). The next day, Dr. Vafai performed a dilation and curettage (D&C) procedure on her because of an incomplete abortion, also known as a miscarriage. (Pa565.)

On October 21, 1993, Petitioner gave birth to her first child. (Pa575.) Her second child was born on June 21, 1995. (Pa 634.)

At the latest, by the time of her first pregnancy in 1993, Acuna knew that being pregnant meant that, barring a miscarriage or an abortion, eventually she was going to have a baby and, in the course of being pregnant, a fetus was forming in her uterus. (Pa566 – Pa 568.)

On April 6, 1996, Acuna went to Dr. Turkish's office. She reported a last menstrual period (LMP) of February 21, 1996. (Pa612.) During this visit, Dr. Turkish performed a physical examination which revealed a pregnancy estimated

at seven or eight weeks of gestation post-LMP, (*i.e.*, from the first day of Petitioner's last menstrual period said to be February 21). (Pa611-Pa612.) An ultrasound confirmed the pregnancy and indicated it was seven weeks from LMP. (Pa607.) Calculations of pregnancy in terms of LMP are two weeks longer than calculations of the pregnancy from the time of conception. (Pa648-Pa649.) Thus, as of April 6, 1996, the pregnancy was seven weeks LMP and five weeks post-conception. *Ibid.*

At the April 6 office visit, Dr. Turkish spoke with Petitioner regarding her condition and treatment, including a discussion of a procedure for the termination of the pregnancy. (Pa603.) Dr. Turkish told Acuna to go home and think about whether she wanted to terminate the pregnancy. (Pa604.)

Three days later, on April 9, 1996, Acuna came back to Dr. Turkish's office for the procedure to terminate her pregnancy. (Pa589.) At that time, she signed a document giving her consent to the termination of her pregnancy. (Pa590-Pa591; Pa594.) At the time of the procedure, Rosa Acuna was 29 years old. (Pa 552.)

Petitioner filed a multi-count complaint against Respondents alleging wrongful death (counts one and two), survivor claims (counts three and four), emotional distress (count five), medical malpractice / negligence (count six) and personal injury (count eleven). Other parts of the complaint (counts seven through ten) directed at a fictitiously-designated nurse have been abandoned. *Acuna v. Turkish*, 808 A.2d 149, 151 (N.J. Super. Ct. App. Div. 2002) ("*Acuna I*").

On May 1, 2001, the Honorable Douglas T. Hauge, J.S.C. granted Respondents' motion for partial summary judgment and dismissed counts one through five asserting claims for wrongful death, survivor claims and emotional distress.

Following leave granted, the Superior Court of New Jersey, Appellate Division ("Appellate Division") affirmed the dismissal of counts one and two, the wrongful death claims, but reversed and remanded on count five, the emotional distress claim, holding that if Petitioner established her claim for medical malpractice, this would constitute a direct tort against Petitioner which would entitle her to emotional distress-based damages. *Acuna I*, at 151.

Petitioner did not appeal the dismissal of the survivor claims (counts three and four), *ibid*, and later abandoned them.[1] *See Acuna v. Turkish*, 894 A.2d 1208, 1211 n.2 (N.J. Super. Ct. App. Div. 2006) ("*Acuna II*").

Following remand and extensive discovery, Respondents moved for summary judgment on the remaining claims of emotional distress (count five) and negligence (counts six and eleven).

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[1] By separate statute, *N.J. Stat. Ann.* § 2A:15-3, tort claims for an injury during one's lifetime survive and are preserved to the decedent's estate. The executor or administrator may pursue any cause of action that the decedent would have had if the decedent had lived. This statute is interchangeability referred to in the case law as the "Survivorship Act" and the "Survival Act." *Compare Smith v. Whittaker*, 734 A.2d 243, 249 (N.J. 1998) *with Canino v. New York News, Inc.*, 475 A.2d 528, 530 n.1 (N.J. 1984). Herein, these claims will be referred to as Petitioner's "survivor claims." To the extent which the Petition raises claims based on dismissal of the survivor claims, they have not been raised below before any appellate tribunal, and therefore are not properly before this Court.

On March 3, 2004, the Honorable Amy Piro Chambers, J.S.C., dismissed Petitioner's remaining claims alleging negligence, medical malpractice and emotional distress. *Acuna II*, 894 A.2d at 1212. On appeal, the Appellate Division reversed and remanded, "for reasons entirely different from those advanced in Acuna's brief." *Id.* at 1213. However, it declined to reconsider its prior decision affirming dismissal of Petitioner's wrongful death claims. *Id.* at 1215.

Prior to remand, however, the Supreme Court of New Jersey granted Respondents' Petition for Certification regarding the negligence and emotional distress issues addressed in *Acuna II*. 902 A.2d 1234 (N.J. 2006). This matter has been fully briefed and argued before the New Jersey Supreme Court.

In response to Respondents' request for review by the New Jersey Supreme Court, Petitioners filed an appeal asserting "a substantial constitutional question" arising out of the dismissal and denial of the wrongful death claims, entitling Petitioner to an appeal "as of right" under the applicable Rule of Court. However, the New Jersey Supreme Court dismissed Petitioner's appeal of the wrongful death arguments raised by this Petition as not presenting a substantial constitutional question. 915 A.2d 1045 (N.J. 2007).

REASONS FOR DENYING THE PETITION

This Petition should be rejected because it seeks review of a well-settled question of New Jersey law which does not conflict with any applicable federal decision, statute or constitutional provision.

The Appellate Division correctly held that the State Supreme Court's interpretation of the New Jersey Wrongful Death Act (hereafter "the Act") in *Giardina v. Bennett*, 545 A.2d 139, 142 (N.J. 1988) and *Graf v. Taggart*, 204 A.2d 140, 142 (N.J. 1964), as not allowing a cause of action for wrongful death prior to birth, did not violate the Fourteenth Amendment's Equal Protection Clause. *Acuna I*, 808 A.2d at 155-56. The New Jersey Wrongful Death Act is an appropriate exercise of a state's police power to define its own tort law.

Further weight against granting this Petition is found in the Third Circuit's repeated repudiation of Fourteenth Amendment challenges to the Act which are nearly identical to those advanced by Petitioner here. *Marie v. McGreevey*, 314 F.3d 136 (3d Cir. 2002), *cert. denied*, 539 U.S. 910 (2003); *Alexander v. Whitman*, 114 F.3d 1392, 1400 (3d Cir. 1997), *cert. denied*, 522 U.S. 949 (1997). There are no conflicting decisions in other Circuits.

Moreover, with both *Acuna I* and *Giardina*, the State of New Jersey is in accord with ten other jurisdictions which require live birth and thirty-one other jurisdictions which require at least fetal viability as a prerequisite to recovery in tort for wrongful death. *See Appendix A on Behalf of Respondents*, State Survey of Permitted Fetal Wrongful Death Actions ("Appendix A"). The position advanced by Petitioner that a wrongful death claim may be brought with regard to a non-viable embryo is followed only in a distinct minority of jurisdictions. *See Appendix A, infra*. The eight jurisdictions which permit such actions are Georgia, Illinois, Louisiana, Mississippi, Missouri, South Dakota, Texas and West Virginia. That determination was generally made by legislative action.

Additionally, in every case where a federal equal protection challenge has been brought, none of the statutes which require live birth as a condition to a wrongful death claim have been held to offend the Fourteenth Amendment. *Marie*, 314 *F.*3d at 141-42; *Justus v. Atchison*, 565 P.2d 122, 131 (Cal. 1977), *overruled on other grounds, Ochoa v. Superior Court,* 703 P.2d 1 (Cal. 1985); *Hernandez v. Garwood*, 390 So. 2d 357, 359 (Fla. 1980); *McVey v. Sargent,* 855 N.E.2d 324, 328-29 (Ind. Ct. App. 2006), *transfer denied,* 869 N.E.2d 447 (Ind. 2007); *Kandel v. White*, 663 A.2d 1264, 1269 (Md. 1995); *Fort Worth Osteopathic Hosp. v. Reese*, 148 S.W.3d 94, 98 (Tex. 2004) (later abrogated by statute);

Attempting to lure the Court's interest in this case, Petitioner incorrectly asserts that the alleged errors below are a result of "confusion" caused by *Roe v. Wade*, 410 U.S. 133 (1973) and *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). While Petitioner seeks to compel recognition of a five-week embryo within the scope of the New Jersey statutory term "person," the holding of *Roe* and reiterated in *Casey* could not be clearer: neither an embryo nor a fetus is a "person" for the purposes of the Fourteenth Amendment. Thus, Petitioner's attack on *Giardina's* interpretation of the Act is mere guise to overturn this aspect of *Roe*.

Furthermore, the acceptance of Petitioner's position that the Equal Protection Clause requires recognition of a wrongful death cause of action for a non-viable fetus will invalidate the statutory framework in place in most states in the country and result in the expansion of tort liability. Of the thirty-one jurisdictions which recognize a wrongful death action when the predicate of viability (in contrast to live birth) is met, at least twenty-one have explicitly rejected the attempt to extend the cause of action to a non-viable fetus.

Accordingly, none of the compelling reasons indicated in Rule 10 of the Supreme Court Rules are present. Accordingly, as discussed below, the petition should be denied.

POINT I: The Appellate Division Correctly Held, In Accord With Other State and Federal Courts, that the "Born Alive" Requirement of New Jersey's Wrongful Death Act Does Not Violate Fourteenth Amendment Equal Protection Guarantees.

The ability to sue for the "wrongful death" of another did not exist at common law. Rather, it appeared as a legislatively-recognized exception to the traditional rule barring such recovery. As recognized below, it is neither a Constitutional nor "fundamental" right subject to enhanced scrutiny. *Acuna I*, 808 A.2d at 155. Owing to its statutory origins in each state, the elements of this action, like other torts, varies from state to state without implicating Equal Protection concerns. There are varying standing requirements, differing limitations periods, disparities in the scope of recovery, and other distinctions in the elements of these tort actions depending on state law.

In New Jersey, an action for wrongful death is intended to compensate survivors for the pecuniary losses they suffer because of the tortious conduct of others. *Giardina*, 545 A.2d at 145. In relevant part, the statute, which enables this recovery, provides:

> [w]hen the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person

> injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury had death not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime. [*N.J. Stat. Ann.* § 2A:31-1.]

The scope of recoverable damages is set forth in a separate provision, limiting them to "pecuniary injuries resulting from such death, together with the hospital, medical and funeral expenses incurred for the deceased." *Id.* at § 2A:31-5.

This tort action did not exist at common law. Instead, it was created, and continues to be regarded, as a "creature of statute" patterned on Lord Campbell's Act, 9 & 10 Vict. c. 93, An Act for compensating the Families of Persons killed by Accidents (Aug. 26, 1846). *Giardina*, 545 A.2d at 144-45 (citation omitted).

As this Court has noted, the statutory origin of a wrongful death claim has "important consequences," foremost among them that "[s]ince the right was unknown at common law, the legislatures which created the right were free to impose restrictions upon it." *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573, 579 (1974) (internal quotation omitted), *impliedly overruled on other grounds*, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990).

As a result, wrongful death jurisprudence is unique to each state. For example, some states hold that an action for wrongful death is barred if the decedent already recovered

for the same injuries during their lifetime, while others permit recovery in such cases. *Id.* at 579. In addition, while recovery for "loss of support" in a wrongful death case has been "universally recognized," compensation for lost services and "loss of society" has produced variation among the states. *Id.* at 584-85.

The differences among the states regarding the definition of, and remedies for, wrongful death is not surprising; the regulation of health and safety, and the provision of tort remedies to compensate for personal injuries is an area in which states have historically exercised general police powers. *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 894 (2000); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 248 (1984) (noting "the States' traditional authority to provide tort remedies to their citizens"); W. Prosser, *Handbook of the Law of Torts*, § 5 at 23 (4th ed. 1971) (remarking that state tort law unquestionably relates to matters of health and safety). Moreover, federalism considerations grant State action of this kind, including New Jersey's definition of "person" in the context of the Act, deferential treatment. *Geier*, 529 U.S. at 894

In this regard, the federal government's deference to state law has led to a variety of approaches which, while different, are not mutually exclusive.[2] *BMW of North America, Inc. v.*

[2] Indeed, under our federalist system, divergent and experimental approaches are encouraged and intended. *Gonzales v. Raich*, 545 U.S. 1, 42 (2005) (O'Connor, J., dissenting) (finding "one of federalism's chief virtues, of course, is that it promotes innovation by allowing for the possibility that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country" (internal quotation omitted)).

Gore, 517 U.S. 559 (1996) (stating "[i]n our federal system, States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case").

In New Jersey, the tort of wrongful death is considered separate and "derivative" from other negligence-based theories of recovery. *Giardina*, 545 A.2d at 145. Petitioner's reference to concepts based in medical malpractice, informed consent and other negligence-related doctrines is therefore misleading and of no consequence in the context of this Petition. *See, e.g.*, (Pet. Br. at 13 – 17.)

Giardina's essential holding, that the Act "does not permit recovery attributable to the wrongful death of an infant before birth," was reached after a searching review of the Act's language, legislative history, historical interpretation, analogous statutory schemes and consideration of a common-law remedy in the form of an emotional distress claim which satisfactorily accommodates the parental interest implicated in appropriate situations. *Giardina*, 545 A.2d at 146. For example, the court noted that the legislature knows how to encompass fetuses and embryos in statutory language, but explicitly did not choose to do so in the Act. *Id.* at 145-46. The court also looked to previous cases in which courts allowed children to recover for prenatal injuries after birth, and noted in those cases the right to recover "attaches, not to the embryo or fetus, but to the living child." *Id.* at 145 (internal quotation marks and citation omitted). The court perceived a legislative intent that a fetus was not intended to be included in the statute as "a being whose death can give rise to a claim for pecuniary injury" and that "the Legislature in enacting the original Act, and in subsequent revisions, never intended to create a derivative action in favor of the survivors of a fetus never born alive." *Id.* at 147.

Only after this comprehensive review, did the New Jersey Supreme Court find "no compelling underlying policy that would impel us to give the statutory term 'person' an expansive interpretation here." *Id.* at 146. Petitioner is thus incorrect when she claims that *Giardina* construed the Act to exclude recovery for fetal wrongful death "based *exclusively* on the premise that the 19th century legislature could not have intended to include [them] . . . because it operated under a false assumption of fact that the unborn child was merely part of his or her mother." (Pet. Br. at 19 (emphasis added).) The court specifically referred to the "contemporary setting" which included ever-enhancing improvements in medical care and understanding of fetal development. *Id.* at 146-47.

In the nineteen years since *Giardina*, the New Jersey Legislature has not acted to override, correct or modify the New Jersey Supreme Court's judgment which anchors the Act's definition of "person" to the original legislative intent of creating a narrow exception to the traditional common law bar which completely prohibited tort recovery for wrongful death.[3] *Id.* at 145.

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[3] It is also significant to note, as Judge (now Justice) Alito did in a similar case discussed *infra*, that "at the time of the adoption of the Fourteenth Amendment and for many years thereafter, the right to recover for an injury to a stillborn child was not recognized." *Alexander*, 114 F.3d at 1409 (Alito, J., concurring). *Accord, Casey*, 505 *U.S.* at 913 (Stevens, J., concurring in part and dissenting in part); *Roe*, 410 U.S. at 157 (stating that "the word 'person,' as used in the Fourteenth Amendment, does not include the unborn"). Thus, *Giardina's* holding that an embryo or fetus is not a "person" under the Act, is consistent with the original intent of the Act, which was to create a limited exception to the common law rule barring recovery for wrongful death, is also consistent with the Fourteenth Amendment.

Petitioner nonetheless contends that the Act violates the Equal Protection Clause and is subject to strict scrutiny because it impacts an alleged fundamental right in her "relationship" with her embryo. (Pet. Br. at 21-22.) Despite Petitioner's characterizations, the Appellate Division correctly held that heightened scrutiny is inappropriate and the Act easily survives rational basis review. Similarly, in dismissing Petitioner's claimed appeal "as of right," the New Jersey Supreme Court appropriately concluded that it did not present "a substantial constitutional question."

For purposes of substantive due process, state actions which implicate anything less than a fundamental right require only that the government demonstrate a reasonable relation to a legitimate state interest to justify the action. *Washington v. Glucksberg*, 521 U.S. 702, 722 (1997). Such laws are generally presumed to be valid and will be sustained if the classification is rationally related to a legitimate state interest. *Fields v. Legacy Health Sys.*, 413 F.3d 943, 955 (9th Cir. 2005).

Rational basis review is appropriate here because there is no fundamental liberty interest embedded in the ability to sue for wrongful death. "Fundamental interests" are not simply general interests of "particular human or societal significance"; rather, they are those which "have their source, explicitly or implicitly, in the Constitution." *Alexander*, 114 F.3d at 1409 (quotation omitted). Because the right to bring a wrongful death action was not part of the common law, and exists purely by operation of statute, "[i]t cannot seriously be argued that a statutory entitlement to sue for the wrongful death of another is a 'fundamental' or constitutional right."

Parham v. Hughes, 441 U.S. 347, 358 n.12 (1979).[4] The Appellate Division therefore correctly held that rational basis review is appropriately applied to Petitioner's claim, as was the case in *Alexander* and *Marie*. Furthermore, the New Jersey Supreme Court appropriately dismissed the appeal "as not presenting a substantial constitutional question."

The Third Circuit recently considered two Equal Protection challenges that were virtually identical to Petitioner's. In both instances, the court applied rational basis review, soundly repudiating plaintiff's arguments (repeated by Petitioner here), and review was denied by this Court. *See Alexander,* 114 F.3d at 1408, *cert. denied*, 522 U.S. 949 (1997); *Marie*, 314 F.3d 136, *cert. denied*, 539 U.S. 910 (2003). *See also Fields*, 413 F.3d 955-56 (rational basis test applied to Oregon statute of limitations and repose despite alleged discrimination against claimants based on date of death and discovery of injury causing death).

In *Alexander*, plaintiff was admitted to a hospital for delivery of an apparently health baby. However, due to unforeseen cardiovascular collapse, the delivery was stillborn. 114 F.3d at 1396. She filed a lawsuit seeking wrongful death and survivor damages; however, the surrogate refused to issue the required letters of administration. This

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[4] Contrary to Petitioner's contention, nowhere does *Alexander* hold "that the question of whether an unborn child is a human being is a question of scientific fact for a jury." (Pet. Br. at 12.) In truth, *Alexander* finds that for purposes of determining whether it is a "person" under the Fourteenth Amendment, "it is immaterial that the complaint pleads that a stillborn child is a human being from conception". 114 F.3d at 1401. Accordingly, there is no apparent or actual conflict among the Circuits on this basis, as is suggested by Petitioner. (Pet. Br. at 12-13.)

prompted the plaintiff to file a class action in the District Court seeking a declaratory judgment that the Act was unconstitutional on Equal Protection grounds because it treated stillbirths different from live births by permitting a cause of action for the latter and prohibiting a cause of action for the former. *Id.* at 1396-97.

The Third Circuit affirmed the district court's dismissal, holding that the plaintiff "can only establish a claim on behalf of her child under the Fourteenth Amendment if the children fall within the protections afforded 'person[s]' as that term is used." *Ibid.* As has been conclusively established by this Court, they do not. *Roe*, *supra,* 410 U.S. at 157; *Casey*, 505 U.S. at 913 (Stevens, J., concurring in part and dissenting in part). The Third Circuit further observed that "[t]he issue is not whether the unborn are human beings, but whether the unborn are *constitutional persons*," *id.* at 1402 (emphasis added).[5]

As for the plaintiff's claim in *Alexander* that the Act violated her due process rights and right to equal protection, the court held that rational basis was the appropriate level of scrutiny as no fundamental right was implicated. The court rejected the argument that the Act infringed on the plaintiff's interest in her "relationship with her unborn child." The court

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[5] Petitioner's arguments regarding the "second patient" to whom a physician owes a duty of care when seeing a pregnant woman, (Pet. Br. at 13), fail to address the proper inquiry regarding Fourteenth Amendment "personhood." Indeed, these arguments in this respect are clearly erroneous, because if she were correct, then any termination of a pregnancy would be, by definition, wrongful, tortious, and criminal. Common sense dictates that a duty of care with regard to this "second patient" is only triggered by a woman's decision to continue her pregnancy uninterrupted.

held that this relationship "is exactly the same whether or not she can bring a wrongful death or survivor action." *Id.* at 1404. Rather than defining or influencing the relationship, the Act determines only whether or not Petitioner may seek pecuniary recovery for its loss. *Ibid.* The court therefore held that the Act should be reviewed under the rational basis test.

The *Alexander* court held that prohibiting a cause of action for an embryo or fetus that dies *in utero* is rationally related to the State's interest in defining its own tort law:

> [t]he requirement that the child on whose behalf a wrongful death and survival action is instituted have been born alive is rationally related to that interest. New Jersey has chosen to draw a bright line that eliminates the nearly impossible problems of proof inherent in such actions when injury to a fetus is at issue. Absent the limitation in these statutes it would be difficult, if not impossible, to prohibit a wrongful death or survival action no matter how early the fetus was in its development. This would mean that one could recover if it could be established that a zygote would have developed had not an alleged tortfeasor injured a developing fertilized egg seconds after the union of sperm and egg. [*Id.* at 1407.][6]

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[6] An attempt to bring a wrongful death claim for the loss of a three-day old frozen embryo that was to be implanted in the woman's body was rejected in *Jeter v. Mayo Clinic Arizona*, 121 P.3d 1256 (Ariz. Ct. App. 2005).

The court went on to observe that a state could permit recovery for an injury to that which would later develop into a fetus but "it certainly was not required to do so under the Due Process or Equal Protection Clauses." It therefore concluded that "[l]imiting such actions in the manner that New Jersey has chosen is both reasonable and practical." *Id.*

In *Marie v. McGreevey,*[7] the Third Circuit also rejected the same argument advanced here in the specific context of abortion. There, the plaintiffs were women who had abortions allegedly without giving their informed consent and claimed that the Act's denial of their right to maintain a cause of action for the wrongful death of an embryo or fetus *in utero* violated their Equal Protection and Due Process rights under the Fourteenth Amendment. 314 F.3d at 139. The court rejected their claims for the same reasons discussed in *Alexander*.

Like the Third Circuit, the New Jersey Appellate Division recognized the frailty of Petitioner's argument advanced here: contrary to Petitioner's contentions, the Act does not attempt to classify women or give them special status based on whether or not they are pregnant; nor does the Act, on its face, focus on any special familial relationship or the sanctity of life. Indeed, the entire linchpin of Petitioner's argument — that a woman has a fundamental relationship with her embryo — was found to be "not dispositive" by the Appellate Division because the Act does not at all affect that relationship. *Acuna I*, 808 A.2d at 155.

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[7] Even though it is directly on point, there is no citation, discussion or analysis of *Marie v. McGreevy* in Petitioner's brief. This is astounding in light of Acuna originally having been an actual party in interest to that litigation in the District Court and represented by the same attorney in both matters.

Petitioners' central arguments closely parallel (if not exactly echo) those raised by the plaintiffs in *Marie*, and should be rejected for the same reasons. Like that case, Petitioner claims that *Giardina* violates her equal protection rights by creating a subclass of pregnant women, namely those who have elected to terminate their pregnancies, because such women are disallowed under the statutory scheme from asserting wrongful death claims. (Pet. Br. at 18.) Also, as in *Marie*, Petitioner alleges that she is subject to an arbitrary and capricious classification because she is unable to assert wrongful death claims on behalf of her terminated embryo in the same manner as women whose children suffered a pre-birth injury that causes death subsequent to their live birth. (Pet. Br. at 19.) These claims, the Third Circuit observed, are "precluded by" *Alexander*. *Id.* at 140-41.

Furthermore, although Petitioner is precluded from bringing a wrongful death claim under the Act, she is not without a cause of action; *Giardina* recognizes a "common law cause of action for emotional distress and mental anguish arising from the death of an infant before birth." *Acuna I*, 808 A.2d at 158 (citing *Giardina*, 545 A.2d at 139). The existence of this cause of action was also recognized by the Third Circuit in *Alexander*, 114 F.3d at 1405-06, and *Marie*, 314 F.3d at 140.[8] This is the manner in which New Jersey law accommodates alleged tortious injury to an embryo or fetus that dies *in utero*. This not an action for the death of a family member as contended by Petitioner. (Pet. Br. at 17.) Rather the claimed malpractice giving rise to the emotional

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[8] Acuna has, in fact, raised a claim for common law emotional distress in Count 5 of the Complaint. This issue remains with the New Jersey Supreme Court.

distress claim was "directed against plaintiff as an expectant mother and thus was a direct claim, not a derivative claim" from the fetal death. *Acuna I,* 808 A.2d at 157; *Acuna II,* 894 A.2d at 1211. Like the plaintiff in *Alexander*, the Petitioner's argument here boils down to a dissatisfaction with the cause of action that New Jersey tort law has provided. *Alexander*, 114 F.3d at 1405-06. But this dissatisfaction does not rise to the level of an equal protection violation. *Id.*

In a comment fairly summarizing the basic reason that this Petition should be rejected, the Third Circuit in *Marie* reiterated that "the New Jersey Wrongful Death Act does not affect the parent/child relationship in this case any more than it did in *Alexander*." *Id.* at 140-42. For this reason, and those expressed above, the Appellate Division correctly held that the classification drawn by *Giardina* survives rational basis review. *See e.g.*, *Acuna I,* 808 A.2d at 155 (stating that "the Act focuses on dependency and pecuniary loss. As such its classifications are rationally related to its purpose").

Accordingly, the Petition lacks merit and should therefore be denied.

POINT II: The Appellate Division's Holding Is Consistent with Other State Courts of Last Resort to Consider the Question.

Every other state court that has considered this issue has also rejected the Federal Equal Protection challenge to their wrongful death statutes that exclude recovery for stillbirths.[9]

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[9] Petitioner suggests that New Jersey's live birth prerequisite to wrongful death claims is a peculiar anomaly. This is wrong. (Cont'd)

The California Supreme Court considered this issue in *Justus v. Atchinson*, 565 P.2d 122, 131 (Cal. 1977) where court viewed the "principal issue" as whether a stillborn fetus was a "person" within the meaning of that state's wrongful death statute. After concluding that it was not, the California Supreme Court stated "[t]here is no merit in plaintiffs' alternative contention that [such a construction of the statute] denies them equal protection of the laws." *Id.* at 122. It further found that the legislature had acted rationally in not providing a cause of action for wrongful death in the case of a stillbirth. *Ibid.* Although the *Justus* court also denied recovery for emotional distress on the part of the parents, that part of the holding was subsequently overruled, bringing the decision in line with the approach taken in *Giardina*.

The Florida Supreme Court employed this interpretation of its wrongful death statute, rejecting a cause of action for the death of a stillborn fetus in *Hernandez v. Garwood*, 390 So.2d 357 (Fla. 1980), and concluded there was no constitutional defect. The plaintiff contended and the trial court concluded that the denial of such a cause of action was a violation of the Equal Protection guarantee. The Florida Supreme Court tersely rejected this analysis, finding that "[t]he statute in no way violates the equal protection clause of the United States Constitution, *see Roe v. Wade,* 410 U.S. 93 S.Ct. 705, 35 L.Ed.2d 147 (1973) (the word 'person' as

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(Cont'd)

Presently, eleven (11) states, including New Jersey, follow this "born alive" rule; twenty-nine or thirty states as well as the District of Columbia employ a viability standard, recognizing a cause of action for the death of only a viable fetus; and only eight (8) recognize a wrongful death claim for a fetal death prior to viability, either at fertilization (six states) or when the fetus becomes "quick" (two states). *See Appendix A.*

used in the fourteenth amendment does not include the unborn)." *Id.* at 359. This decision was followed in *Young v. St. Vincent's Medical Center,* 653 So.2d 499 (Fla. Dist. Ct. App. 1995), *aff'd*, 673 So.2d 482 (Fla. 1996).

Similarly, in *Kandel v. White*, 663 A.2d 1264 (Md. 1994), the Maryland Court of Appeals rejected the contention that drawing a line between viable and nonviable fetuses for wrongful death recovery was arbitrary; it concluded that excluding non-viable fetuses was not an equal protection violation. *Id.* at 1270.

The Texas Supreme Court also concluded that wrongful death statutes may properly distinguish between live birth and still births, and between viable and non-viable fetuses. In *Fort Worth Osteopathic Hosp. v. Reese,* 148 S.W.3d 94 (Tex. 2004), wrongful death and survivor claims were brought after a fetus died *in utero* during the seventh month of pregnancy. While the court noted that the fetus was viable, it nonetheless held that there was no cause of action under either the wrongful death or survivor statute, each of which required a live birth as a predicate for the claim.[10] In addition, it dealt with the constitutional question as "a matter of first impression," stating:

> Because we conclude that the Legislature's decision to exclude such claims is not

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[10] After the events giving rise to this case, the Texas legislature enacted a statute under which a cause of action for wrongful death may accrue at any time post-fertilization. *See Tex. Civ. Prac. & Rem. Code Ann.* § 71.001 (Vernon 2007). That statute specifically did not apply to claims arising out of medical care. Nonetheless, the analysis in *Reese* illustrates that the Fourteenth Amendment does not demand uniformity among the states in the regard.

> unconstitutional, we hold that the court of appeals erred in concluding that the Equal Protection Clause guarantees parents the right to bring a wrongful death or survival claim for a stillborn child. [*Id.* at 95.]

The Texas Supreme Court framed the equal protection argument as follows:

> Two classifications are at issue here. The first is the distinction in the wrongful death statute between parents of a stillborn fetus and parents of a child born alive. The second is the distinction under the survival statute between a fetus that dies *in utero* and a fetus that is born but dies subsequent to birth. The United States Supreme Court has held that the unborn are not included within the protection of the Fourteenth Amendment, which contains the Equal Protection Clause. . . . While the Supreme Court has acknowledged the state's interest in the life of a fetus before birth . . . it has never repudiated its holding in *Roe* that the Equal Protection Clause does not apply to a fetus. [*Id.* at 98 (citations omitted).]

Taking into consideration the derivative nature of the wrongful death claim, it held that there was no equal protection violation occasioned by prohibiting wrongful death or survivor claims after a stillbirth. The court stated that "[i]t is not a violation of the Equal Protection Clause to fail to provide parents with a claim for the wrongful death of a fetus *in utero* when the Equal Protection Clause does not

prohibit a legislative body from withholding a wrongful death cause of action from the fetus." *Ibid.* [11]

Most recently, in *McVey v. Sargent,* 855 N.E.2d 324 (Ind. Ct. App. 2006), *transfer denied,* 869 N.E.2d 447 (Ind. 2007), the court rejected a challenge that that state's Child Wrongful Death Statute violated equal protection guarantees in not permitting an action to be brought for the death of a viable fetus. It noted that the cause of action had not been recognized at common law and that the legislature intended to draw a line that would define and limit the cause of action only when the child had been "born alive." It found that the state has "an interest in determining that there is a specific point" at which parents may bring an action for a child's death. It concluded:

> The fact that the legislature set that point at the time of a live birth is rationally related to its legitimate interest in having such a time defined for its citizenry so that they might then pursue the action authorized by the statute. Therefore, we do not find the statute to violate equal protection. [855 N.E.2d at 329.]

The Indiana Supreme Court declined to review the matter.

This Court has recognized that the state has the ability to draw lines regarding the scope of tort liability and that the

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[11] Further, it explicitly overruled an earlier Court of Appeals holding that the wrongful death and survival statutes violated both federal and state constitutions. *Reese*, 148 S.W. 3d at 97 (overruling *Parvin v. Dean*, 7 S.W.3d 264 (Tex. App. 1999). *Parvin* did not proceed beyond the intermediate Court of Appeals.

primary tasking of the exercise of that power is to the legislature. Although not speaking in terms of an equal protection analysis, the New Hampshire Supreme Court eloquently addressed this issue in considering the availability of a wrongful death action for a ten to twelve week old fetus:

> The viable-nonviable distinction was made as part of the never-ending effort to widen more and more the circle of liability which surrounds us. As with all such efforts, the pressure never ends. When a new line is drawn, the pressure shifts to form a new and wider circle. Years ago, few if any would have foreseen that the circle would include a viable fetus. Who can foresee what the next step would be if the circle were to include the nonviable fetus. If life is not to become intolerable, there must be some boundaries to the zone of liability. Neither logic nor science is the determining factor. It is the policy of the law which must establish a reasonable limitation on liability. In our opinion, it is not reasonable to extend liability to a nonviable fetus. [*Wallace v. Wallace,* 421 *A.*2d 134, 136-37 (N.H. 1980).]

While a few states may have reached a contrary conclusion as to the availability of the wrongful death cause of action for a non-viable fetus, this does not render the New Jersey statute violative of equal protection guarantees.

In sum, Petitioner's arguments are contrary to the decisions in sister jurisdictions, the fundamental principles of the Act, and the basic reasoning of *Giardina*, *Acuna I*, *Alexander*, and *Marie*. Against this, Petitioner has provided no compelling basis for this Court to accept the Petition for review.

CONCLUSION

It is submitted that in accordance with Rule 10, the Petition be denied for the reasons expressed above, in addition to those articulated by the Appellate Division in *Acuna I* and by the Third Circuit in *Alexander* and *Marie*.

Respectfully submitted,

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APPENDIX

APPENDIX A ON BEHALF OF RESPONDENTS:
STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

		Wrongful Death	Point for Accrual	Authority	Failed Equal Protection Challenge
1	AL	Yes.	Viability.	*Eich v. Gulf Shores*, 300 *So.* 2d 354, 358 (Ala. 1974) (allowing wrongful death action for viable fetus); *Gentry v. Gilmore*, 613 *So.* 2d 1241, 1243-44 (Ala. 1993) (no cause of action for non-viable fetus).	No reported decision.
2	AK	No.	Live birth.	*Mavel v. Pinkerton's Inc.*, 399 F. Supp. 2d 1064, 1068 (D. Alaska 2005) (no cause of action for pre-viability wrongful death).	No reported decision.
3	AZ	Yes.	Viability.	*Summerfield v. Superior Court of County of Maricopa*, 698 *P.*2d 712, 722 (Ariz. 1985) (recognizing cause of action post-viability wrongful death); *Jeter v. Mayo Clinic Arizona*, 121 *P.*3d 1256 (Ariz. App. 2005)(no wrongful death cause of action for three-day old non-viable embryo).	No reported decision.
4	AR	Yes.	Live birth.	*Norwood v. Baker*, 172 F.3d 595, 598 (8th Cir. 1999) (Arkansas wrongful death statute "does not allow a cause of action to be brought for a stillborn fetus").	No reported decision.
5	CA	No.	Live birth.	*Justus v. Atchinson*, 565 *P.*2d 122, 131 (Cal. 1977) (live birth required to state cause of action for wrongful death), *overruled on other grounds*, *Ochoa v. Superior Court*, 703 *P.*2d 1 (Cal. 1985).	*Justus*, 565 *P.*2d at 131.
6	CO	Yes.	Viability.	*Hamby v. McDaniel*, 984 P.2d 606, 608 (Colo. 1999) (wrongful death statute "may be maintained only for the death of a viable fetus").	No reported decision.
7	CT	Yes.	Viability.	*Hatala v. Markiewicz*, 224 *A.*2d 406, 408 (Conn. Super. 1966) (allows wrongful death cause of action for viable fetus).	No reported decision.
8	DE	Yes.	Viability.	*Watson v. Lidgett*, 63 A.3d 1033, 1038 (Del. Super. Ct. 2012) (wrongful death statute "limited to the death of a viable fetus").	Failed to establish.
9	FL	No.	Live birth.	*Hernandez v. Garwood*, 390 *So.* 2d 357, 359 (Fla. 1980) (no cause of action for stillborn fetus).	*Ibid.*
10	GA	Yes.	Quickening.	*Porter v. Shanbaum*, 516 S.E.2d 324, 325 (Ga. App. 1999) (recovery of wrongful death "for the negligent injury to a viable fetus").	No reported decision.
11	HI	Yes.	Viability.	*Wade v. U.S.*, 745 *F. Supp.* 1573, 1579 (D. Hawaii 1990) (with no controlling authority on point, federal court's "best estimate" is that Hawaii law would permit wrongful death claim for viable fetus but not for non-viable fetus).	No reported decision.

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		Wrongful Death	Point for Accrual	Authority	Failed Equal Protection Challenge
12	ID	Yes.	Viability.	*Volk v. Baldazo*, 651 *P.*2d 11, 14 (Idaho 1982) (cause of action may be maintained for viable fetus); *Santana v. Zilog, Inc.*, 95 *F.*3d 780, 782 (9th Cir. 1996) (anticipating that Idaho law would not recognize wrongful death action for non-viable fetus).	No reported decision.
13	IL	Yes.	Fertilization.	740 *Ill. Comp. Stat.* 180/2.2 (2007).	No reported decision.
14	IN	No.	Live birth.	*Bolin v. Wingert*, 764 *N.E.*2d 201, 207 (Ind. 2002) ("only children born alive are 'persons' for purposes of wrongful death statute").	*McKey v. Sargent*, 855 *N.E.*2d 324, 328-29 (Ind. Ct. App. 2006), *transfer denied*, 869 *N.E.*2d 447 (Ind. 2007).
15	IA	No.	Live birth.	*Dunn v. Rose Way, Inc.*, 333 *N.W.*2d 830, 843-35 (Iowa 1983) (wrongful death suit cannot be brought for the death of a viable unborn child).	No reported decision.
16	KS	Yes.	Viability.	*Hale v. Manion*, 368 *P.*2d 1, 3 (Kan. 1962) (parents can maintain a wrongful death action for a stillborn viable fetus); *Hume v. Clinton*, 792 *P.*2d 1032, 1038 (Kan. 1990) (no wrongful death cause of action for non-viable fetus).	No reported decision.
17	KY	Yes.	Viability.	*Rice v. Rizk*, 453 *S.W.*2d 732, 735 (Ky. 1970) (viable fetus a "person" within meaning of wrongful death act).	No reported decision.
18	LA	Yes.	Fertilization.	*La. Civ. Code Ann. art.* 26 (2006) (unborn child considered a "person" under wrongful death act, codifying *Danos v. St. Pierre*, 402 *So.*2d 633, 637 (La. 1981)).	No reported decision.
19	ME	No.	Live birth.	*Shaw v. Jendzejec*, 717 *A.2d* 367, 372 (Me. 1998) (state wrongful death act does not recognize a cause of action for wrongful death brought by the parents of a stillborn fetus).	No reported decision.
20	MD	Yes.	Viability.	*Smith v. Bocelle*, 804 *A.*2d 451, 456-57 (Md. 2002) (wrongful death action not maintainable for non-viable fetus).	*Kandel v. White*, 663 *A.*2d 1264, 1269 (Md. 1995).
21	MA	Yes.	Viability.	*Mone v. Greyhound Lines, Inc.*, 331 *N.E.*2d 916, 918-20 (1975); *Remy v. MacDonald*, 801 *N.E.*2d 260, 265 (Mass. 2004) (wrongful death action allowed for viable fetus); *Thibert v. Mika*, 646 *N.E.*2d 1025, 1026 (Mass. 1995) (no cause of action for non-viable fetus).	No reported decision.

APPENDIX A ON BEHALF OF RESPONDENTS: STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

		Wrongful Death	Point for Accrual	Authority	Failed Equal Protection Challenge
22	MI	Yes.	Viability.	*Estate of McDowell v. Stubbs*, 564 *N.W.*2d 463 (Mich. 1997) (wrongful death action allowed for viable fetus); *McClain v. University of Michigan Bd. of Regents*, 665 *N.W.*2d 484, 486 (Mich. App.), *appeal denied*, 671 *N.W.*2d 46 (Mich. 2003) (a non-viable fetus is not a person with the wrongful death act)	No reported decision.
23	MN	Yes.	Viability.	*Verkennes v. Corniea* (1949) 38 *N.W.*2d 838, 841 (Minn. 1949) (cause of action allowed for wrongful death of a viable fetus).	No reported decision.
24	MS	Yes.	Quickening.	*Miss. Code Ann.* § 11-7-13 (2007) (codifying *Gregory v. Fed. Credit Union v. Tucker*, 853 *So.*2d 104 (Miss. 2003)) (wrongful death statute created cause of action for death of fetus which is "quick")	No reported decision.
25	MO	Yes.	Fertilization.	*Connor v. Monfem Co.*, 898 *S.W.*2d 89, 92-93 (Mo. 1995) (plaintiff could bring a claim for the wrongful death of non-viable fetus).	No reported decision.
26	MT	Yes.	Viability.	*Sudeck v. Kyler*, 887 *P.*2d 730, 733 (Mont. 1995) (allowing cause of action for full-term stillborn fetus); *Blackburn v. Blue Mountain Women's Clinic*, 951 *P.*2d 1, 16 (Mont. 1997) (limiting action to fetuses which are viable)	No reported decision.
27	NE	No.	Live birth.	*Smith v. Columbus Community Hospital, Inc.*, 387 *N.W.*2d 490, 492 (Neb. 1986) (holding that viable fetus which dies prior to birth as result of another's negligence does not have cause of action for damages under wrongful death statute).	No reported decision.
28	NV	Yes.	Viability.	*White v. Yup*, 458 *P.*2d 617, 623-24 (Nev. 1969) (cause of action exists for stillborn viable fetus).	No reported decision.
29	NH	Yes.	Viability.	*Poliquin v. McDonald*, 135 *A.*2d 249, 251 (N.H. 1957) (cause of action exists for wrongful death of stillborn viable fetus); *Wallace v. Wallace*, 421 *A.*2d 134, 136-37 (N.H. 1980) (no cause of action for stillborn, non-viable fetus).	No reported decision.
30	NJ	No.	Live birth.	*Giardina v. Bennett*, 545 *A.*2d 139, 147 (N.J. 1988) (fetus not a person for purposes of wrongful death statute)	*Marie v. McGreevey*, 314 F.3d 136, 141-42 (3d Cir. 2002), *cert. denied*, 539 *U.S.* 910 (2003)
31	NM	Yes.	Viability.	*Salazar v. St. Vincent Hosp.*, 619 *P.*2d 826, 830 (N.M. Ct. App.) (recognizing an independent cause of action for the wrongful death of a viable fetus), *writ. quashed*, 617 *P.*2d 1321 (N.M. 1980); *Miller v. Kirk*, 905 *P.*2d 194, 195-96 (N.M. 1995) (no cause of action for non-viable fetus).	No reported decision.

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STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

		Wrongful Death?	Point for Accrual	Authority	Failed Equal Protection Challenge
32	NY	No	Live birth	*Endresz v. Friedberg*, 248 *N.E.*2d 901, 905 (N.Y. 1969) (requiring live birth to bring wrongful death action)	No reported decision.
33	NC	Yes.	Viability.	*DiDonato v. Wortman*, 358 *S.E.*2d 489, 493 (N.C. 1987) (holding wrongful death statute's definition of "person" includes viable fetus).	No reported decision.
34	ND	Yes	Viability	*Hopkins v. McRae*, 359 *N.W.*2d 862, 863 (N.D. 1984) (wrongful death action may be brought for loss of a viable fetus)	No reported decision.
35	OH	Yes.	Viability.	*Werling v. Sandy*, 476 *N.E.*2d 1053, 1055 (Ohio 1985) (holding that a viable fetus negligently injured and subsequently stillborn could be the subject of a wrongful death action); *Egan v. Smith*, 622 *N.E.*2d 1191, 1193-94 (Ohio App. 1993) (no cause of action for non-viable fetus).	No reported decision.
36	OK	Yes	Viability	*Evans v. Olsen*, 550 *P.*2d 924, 928 (Okl. 1976) (allowing wrongful death of action for viable fetus); *Guye v. Hutcoholth*, 830 *P.*2d 1393, 1394 (Okl. App. 1991) (no wrongful death action for non-viable fetus)	No reported decision.
37	OR	Yes.	Viability.	*Libbee v. Permanente Clinic*, 518 *P.*2d 636, 640 (Or. 1974) (wrongful death action is available for death of viable fetus); *LaDu v. Oregon Clinic, P.C.*, 998 *P.*2d 773, 735-36 (Or. App.), *review denied*, 18 *P.*3d 1099 (Or. 2000) (no cause of action for wrongful death of non-viable fetus).	No reported decision.
38	PA	Yes	Viability	*Cowell ex rel. Bubna v. Palmer*, 634 *A.*2d 608, 610 (Pa. 1993) (wrongful death cause of action allowed only in cases of fetal viability)	No reported decision.
39	RI	Yes.	Viability.	*Miccolis v. AMICA Mut. Ins. Co.*, 587 *A.*2d 67, 69 (R.I. 1991) (holding non-viable fetus is not a "person" within the meaning of the wrongful death statute).	No reported decision.
40	SC	Yes	Viability	*Crosby v. Glass City Trucking Co.*, 532 *S.E.*2d 856, 857 (S.C. 2000) (nonviable fetus may not maintain wrongful death action)	No reported decision.
41	SD	Yes.	Fertilization.	*Wiersma v. Maple Leaf Farms*, 543 *N.W.*2d 787, 792 (S.D. 1996) (allowing wrongful death claim to be brought for non-viable fetus).	No reported decision.
42	TX	Yes	Viability	*Tex. Code Ann.* § 20-5.06(c) (2007) (permitting the recovery of damages for the wrongful death of a viable fetus)	No reported decision.
43	TX	Yes	Fertilization.	*Tex. Civ. Prac. & Rem. Code Ann.* § 71.001 (Vernon 2007) (defining embryo, at any stage post-fertilization, as an "individual" for purposes of wrongful death act).	*Fort Worth Osteopathic Hosp. v. Reese*, 148 *S.W.*3d 94, 98 (Tx. 2004).

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STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

		Wrongful Death	Point for Accrual	Authority	Failed Equal Protection Challenge
44	UT	Yes.	Live birth.	*Nelson v. Peterson*, 542 *P.*2d 1075, 1077 (Utah 1979) (allowing emotional distress recovery but not wrongful death claim for death of a viable fetus).	No reported decision.
45	VT	Yes.	Viability.	*Vaillancourt v. Medical Center Hospital* of Vermont, 425 *A.*2d 92, 95 (Vt. 1980) (upholding statutory cause of action for wrongful death of viable, stillborn fetus).	No reported decision.
46	VA	No.	Live birth.	*Castle v. Peters*, 636 S.E.2d 342, 347-48 (Va. 2006) (fetus not a "person" for purpose of wrongful death act until born alive).	No reported decision.
47	WA	Yes.	Viability.	*Moen v. Hanson*, 537 *P.*2d 266, 266-67 (Wash. 1975)(wrongful death action permitted for viable fetus); *Baum v. Burrington*, 79 *P.*3d 456, 459 (Wash. Ct. App. 2003) (no cause of action for non-viable fetus), *appeal denied*, 95 *P.*3d 758 (Wash. 2004).	No reported decision. *But see Kim v. Long*, 2004 *WL* 1775664 *2 (Wash. App. 2004) (argument raised, but constitutional issues not reached).
48	WV	Yes.	Fertilization.	*Farley v. Sartin*, 466 S.E.2d 522, 534 (W. Va. 1995) (wrongful death statute encompasses non-viable fetus).	No reported decision.
49	WI	Yes.	Viability.	*Kwaterski v. State Farm Mut Automobile Ins. Co.*, 148 *N.W.*2d 107, 111-12 (Wis. 1967) (wrongful death action permitted in death of viable fetus).	No reported decision.
50	WY			*Wyo. Stat. Ann.* § 1-38-101 (2007) (providing that "[w]henever the death of a person is caused by wrongful act, neglect or default . . . such as would have entitled the party injured . . . to maintain an action to recover damages if death had not ensued . . ."). No reported decision interpreting applicability of statute to fetus or embryo.	No reported decision.
51	DC	Yes.	Viability.	*Greater Southeast Community Hosp. v. Williams*, 482 *A.*2d 394, 397-98 (D.C. 1984) (cause of action for wrongful death of viable fetus); *cf. Ferguson v. District of Columbia*, 629 *A.*2d 15, 20 (D.C. 1993) (non-viable fetus does not have cause of action under survival statute).	No reported decision.

APPENDIX A ON BEHALF OF RESPONDENTS:
STATE SURVEY OF PERMITTED FETAL WRONGFUL DEATH ACTIONS

***Wrongful Death Claim on Behalf of a Fetus Permitted*:** **39 Jurisdictions.**

Viability: 31 AL, AZ, AR, CO, CT, DE, HI, ID, KS, KY, MD, MA, MI, MN, MT, NV, NH, NM, NC, ND, OH, OK, OR, PA, RI, SC, TN, UT, VT, WI, DC.

Quickening: 2 GA (statute), MS (statute).

Fertilization: 6 IL (statute), LA (statute), SD, MO, TX (statute), WV.

***Wrongful Death Claim on Behalf of Non-Viable Fetus Not Permitted*:** **21 Jurisdictions.**

AL, AK, AZ, HI, ID, KS, MD, MA, MI, MT, NH, NM, OH, OK, OR, PA, RI, SC, UT, WA, DC.

***Wrongful Death Claim on Behalf of a Fetus Not Permitted*:** **11 Jurisdictions.**

AK*, CA, FL, IN, IA, ME, NE, NJ, NY, VA, WA.

***Jurisdictions With No Controlling State Law*:** **1 Jurisdiction (WY)**

***Failed Equal Protection Challenges*:** **6 Jurisdictions**

California: *Justus v. Atchinson*, 565 *P.*2d 122, 131 (Cal. 1977), *overruled on other grounds*, *Ochoa v. Superior Court*, 703 *P.*2d 1 (Cal. 1985).

Florida: *Hernandez v. Garwood*, 390 *So.* 2d 357, 359 (Fla. 1980).

Indiana: *McVey v. Sargent*, 855 *N.E.*2d 324, 328-29 (Ind. Ct. App. 2006), *transfer denied*, 869 *N.E.*2d 447 (Ind. 2007).

Maryland: *Kandel v. White*, 663 *A.*2d 1264, 1269 (Md. 1995).

New Jersey: *Marie v. McGreevey*, 314 *F.*3d 136, 141-42 (3d Cir. 2002), *cert. denied*, 539 *U.S.* 910 (2003).

Texas: *Fort Worth Osteopathic Hosp. v. Reese*, 148 *S.W.*3d 94, 98 (Tx. 2004), abrogated by *Tex. Civ. Prac. & Rem. Code Ann.* § 71.001 (Vernon 2007).

***Successful Equal Protection Challenges*:**
None.

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* Alaska federal courts have held no wrongful death cause of action lies for a non-viable fetus, but state courts have not considered this issue, or whether such a claim is allowed for a viable fetus.